Supreme Court, U.S.
FILED
JAN 29 2001
CLERK

No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This brief is submitted in reply to that of respondent Irene Blumer, who opposes the Petition for Writ of Certiorari.

I. REVIEW IS APPROPRIATE BECAUSE THE DECISION BELOW DIRECTLY CONFLICTS WITH UNANIMOUS FEDERAL AND STATE HIGH COURT PRECEDENT AND WITH THE VIEWS OF THE FEDERAL ADMINISTERING AGENCY, BECAUSE AN IMPORTANT FEDERAL QUESTION IS PRESENTED AND BECAUSE THAT QUESTION SHOULD NOW BE RESOLVED BY THIS COURT.

Respondent concedes, as she must, that the decision below directly conflicts with unanimous federal and state high court precedent and with the views of the administering federal agency (respondent's brief at 1). However, she unfairly minimizes the importance of the federal question presented.

That question is whether the "income first" requirement of the Wisconsin Medical Assistance (MA or Medicaid) statute, requiring that the income of an institutionalized spouse be attributed to the community spouse to provide for the latter's monthly maintenance needs, conflicts with the spousal impoverishment provisions of the federal statute, 42 U.S.C. § 1396r-5. Essentially the same question, arising under the laws or policies of Ohio and New Jersey respectively, has been presented to this Court twice in recent years. *See Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 525 U.S. 964, 119 S. Ct. 408 (1998) (*see* Petition No. 98-360 at i); *Cleary ex rel. Cleary v. Waldman* ("*Cleary II*"), 167 F.3d 801 (3d Cir.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 170 (1999) (*see* Petition No. 99-49 at i).

In *Chambers*, the petitioners (a class of elderly couples seeking Medicaid for the institutionalized spouse under the spousal impoverishment provisions of state and federal law) forcefully argued that whether the states have discretion to impose an "income first" policy or are required, as the court below did here, to employ a "resource first" approach, was a question "national in scope, vital in nature, and likely to arise again" (original bolding deleted). *See* Petition No. 98-360 at 26-28. The *Cleary* petitioners made a similar argument concerning the national significance of the question presented for the administration of the spousal impoverishment provisions of 42 U.S.C. § 1396r-5. Here, the petitioner Wisconsin Department of Health and Family Services (Department) also submits that this case presents a significant federal question concerning the scope of the states' discretion to administer the spousal impoverishment provisions of the federal law in accordance with state attribution of income requirements (*see* petition at 15 and 18-20).

In support of its argument on the significance of the federal question, the Department attempted to provide a rough estimate of the fiscal impact of the decision below on Wisconsin Medicaid costs. The petition also suggested that the answer by this Court to the question of law presented could have a significant fiscal impact on MA costs in the approximately three dozen other states which also employ an "income first" approach via statute, rule or policy (*see* petition at 18-21).[1] While respondent disputes the significance of the federal question presented, she does so *only* on fiscal grounds and does not argue that the question of law presented for this Court is not serious or important (*see* respondent's brief at 1-7). Indeed, a comparison between

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[1]Obviously, the Department did not mean to suggest that the decision below would itself have a direct effect on MA costs anywhere except Wisconsin. The Department regrets any such misinterpretation of the Petition.

Blumer's relatively detailed argument on the merits of the question presented (*see* respondent's brief at 7-15) and the thoughtful, well-reasoned Court of Appeals' decisions in *Chambers* and *Cleary II* neatly demonstrates that the federal question presented is significant.

While Blumer does not argue that the question of law presented lacks gravity or importance, she does attack the Department's arithmetic and the source of its fiscal impact figures.[2] Although the Department acknowledges that its fiscal impact estimates are rough and for purposes of illustration only, there appear to be two basic points that Blumer cannot dispute. First, while the estimated annual cost to the Wisconsin Medicaid program of $2.4 million for each 100 new cases (*cf.* petition at 20; respondent's brief at 3-4) may pale in comparison with the total state MA budget, $2.4 million is undeniably a significant amount of money. Indeed, that figure rivals or exceeds the total annual cost of many other worthy health care or social services programs.

Secondly, respondent does not seriously dispute that, regardless of what the rate of return may be, a significant amount of resources is necessary to generate income of $992 monthly or $11,928 annually (*cf.* petition at 19-20; respondent's brief at 4-7). Moreover, there are many couples

[2]The Department acknowledges that the records on which the rough impact estimate is based are not in the record at this time, although the records supporting the median attribution amount of $992 per month and the total additional MA cost per month (*see* petition at 19-20) are public and available to respondent or her counsel. Blumer attacks the Department's concededly rough average length of stay estimate of 50 months based on data contained in a recent report published by the Department (*see* respondent's brief at 3; R. App. 2a). The Department suggests, however, that because of scope and other limitations of the survey, the figures in the report are themselves not entirely reliable or correct for the particular purpose Blumer uses them. For these and other reasons, the Department relies on the 50-month figure simply to illustrate its basic argument that the costs of the "resource first" approach mandated by the court below will be substantial.

with substantial assets who are likely to take advantage of the prospect, now available to them under the "resource first" approach mandated by the court below, of sheltering assets far in excess of the ordinary resource allowance. And the number of those couples will rise predictably when elder law practitioners and financial planners adjust planning strategies in response to the decision below. Thus, the Department fully adheres to its basic point that the actual and potential fiscal impact of the decision below is an aspect of the significant federal question presented which cannot be ignored.

While this case raises essentially the same important federal question presented to this Court in *Chambers and Cleary II*, there are two crucial differences between the posture of this case and that of *Chambers* and *Cleary II* which now warrant this Court's review. Most importantly, there is now a direct conflict between the decision below and unanimous federal and state high court precedent that did not exist in those two cases. In addition, the Department submits, in *Chambers* and *Cleary II*, the Third and Sixth Circuits correctly decided the federal question presented based on the language of the statute and the federal policies the statute is intended to serve, while, in this case, the court below did not.

The question presented here has percolated through a variety of state and federal courts. Further percolation would not be useful because the nature of the dispute has now crystallized and the respective opposing public and private interests are well defined in the cases, including this one. The significance of the issue for the administration of the spousal impoverishment provisions of the Medicaid Act by the states is not seriously disputed.

It is clear that this Court will ultimately have to resolve the important federal question presented and this case is the appropriate vehicle for deciding it.

II. REVIEW IS APPROPRIATE BECAUSE THE COURT BELOW WAS WRONG: THE STATUTORY LANGUAGE IS AMBIGUOUS AND THE "INCOME FIRST" APPROACH REQUIRED BY WISCONSIN LAW IS A REASONABLE, PERMISSIBLE INTERPRETATION OF 42 U.S.C. § 1396r-5.

A full discussion of the merits of the question presented is neither appropriate nor possible in this brief. However, a limited reply to Blumer's relatively extended argument on the merits is necessary to reinforce the significance of the question presented and to outline why the court below was wrong in concluding that 42 U.S.C. § 1396r-5, particularly subsection (e)(2)(C), does not permit the "income first" approach required by Wis. Stat. § 49.455(8)(d).

The claim by the court below--and by Blumer--that 42 U.S.C. § 1396r-5(e)(2)(C) unambiguously requires the "resource first" approach and that all the other federal and state high courts who reached the opposite conclusion are wrong, demonstrates the existence of ambiguity more tellingly than pages of textual argument by the Department. *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 739 (1996) (observing that existing conflict between court decisions alone was sufficient to establish that the wording of the statute was ambiguous). The fact that courts have derived two diametrically opposed readings from the language of 42 U.S.C. § 1396r-5(e)(2)(C) itself illustrates the ambiguity of that provision and the resulting need for statutory interpretation.

Analyzing 42 U.S.C. § 1396r-5 using the ordinary tools of statutory construction, it is apparent that the "income first" policy required by Wisconsin law is a reasonable

interpretation of that statute. First, the view that states have discretion under the spousal impoverishment provisions of 42 U.S.C. § 1396r-5 to employ the "income first" policy is based on a reasonable reading of the language of the statute itself.

Blumer insists, however, that subsection (e)(2)(C) deals "exclusively with asset eligibility determinations" and is "essentially unrelated" to the provisions of subsection (d) which protect income for the community spouse after a determination of eligibility (*see* respondent's brief at 8-9). This wooden view of the interrelationship of the provisions of 42 U.S.C. § 1396r-5 has been rejected in *Cleary II*, in *Chambers* and in other cases as well. *See id.*, 145 F.3d at 801-03; *Cleary II*, 167 F.3d at 808-10. Rather, according to *Cleary II*, subsections (b) and (d) make clear "that a certain portion of the community spouse's income may come from the income of the institutionalized spouse." *Id.* at 809. The court continued:

> The purpose of subsection (d) is to make available to the community spouse so much of the institutionalized spouse's income as is necessary to ensure her monthly need. We agree that "it would be anomalous to construe (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation."

Id., 167 F.3d at 809, quoting *Cleary v. Waldman* ("*Cleary I*"), 959 F. Supp. 222, 232 (D.N.J. 1997). The myopic reading of the language of subsection (e)(2)(C) adopted by the court below and by respondent is simply not required by a reading of that provision in the context of the spousal impoverishment statute as a whole.

Respondent's claim that the informal views of the Health Care Financing Administration (HCFA), the federal administering agency, and of the Department of Health and Human Services (DHHS) Secretary have been "inconsistent" and are, therefore, not entitled to deference is disingenuous, if not simply inaccurate. In fact, HCFA and DHHS have been entirely *consistent* in viewing the "income first" approach as a permissible interpretation of 42 U.S.C. § 1396r-5 (*see* Pet. App. 78a-90a). *See also Cleary II*, 167 F.3d at 811-12; *Chambers*, 145 F.3d at 800 and 803.

At 11-13 of her brief, Blumer discusses the legislative history of subsection 5(e)(2)(C), arguing that the Conference Committee covertly inserted a "resource first" requirement into that subsection, despite the fact that the Conference Committee eliminated an express "resource first" provision appearing in the Senate-approved version of the bill. This is a counter-intuitive interpretation of the legislative history that is not supported by the Conference Committee Report itself.

The Conference Committee's own description of the legislative compromise that resulted in the fair hearing provisions of 42 U.S.C. § 1396r-5(e) stated:

> The agreement does not exclude from countable resources those assets necessary to produce income available to the community spouse . . . . Instead, the agreement provides that either . . . spouse may request a fair hearing as to whether the community spouse resource allowance is adequate . . . . If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the

> community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State-established resource allowance.

H.R. Conf. Rep. No. 100-661, at 257 (1988), *reprinted in* 1988 U.S.C.C.A.N. 803, 1043 (emphasis supplied).

Furthermore, Blumer's interpretation of the legislative history has been soundly rejected by the courts. *See Cleary II*, 167 F.3d at 811; *Chambers*, 145 F.3d at 803-04 ("The legislative history of the statute does not indicate the requirement of a single approach to revising the community spouse resource allowance.").

In short, the court below wrongly decided the federal question presented and review by this Court is appropriate.

CONCLUSION

For the reasons discussed above and in the petition, this Court should issue a writ of *certiorari* to review the decision of the Wisconsin Court of Appeals, District IV.

Respectfully submitted,

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January 2001